IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

SARDARA RAM V. THE STATE OF RAJASTHAN.

D. B. CRIMINAL APPEAL NO. 232/87

Under Section 374 (2), Cr.P.C.,against the Judgment dated 08.07.1987, passed by Shri S.N.Shah, RHJS, District & Sessions Judge, Sirhoi, in Criminal Case No.34/85

DATE OF JUDGMENT :::: 05-10-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. Suresh Kumbhat) for appellant.
Mr. M. K. Garg)
Mr. J.P.S.Choudhary, P.P., for the State

BY THE COURT: (PER HON'BLE MR. BHANDARI, J.):-

Aggrieved by the judgment dated 08.07.1987, passed by the District & Sessions Judge, Sirohi, the accused – appellant Sardara Ram has preferred this appeal.

The prosecution case was started with lodging of First Information Report (FIR) by Kishan Lal at about 10.15 A.M. With Police Station, Barlut, District – Sirohi, stating therein that his uncle Nathu Ram is missing from 10-07-1985. Nathuram was searched at all the places, including at the places of relatives, but he could not be traced out. Nathuram was not having any previous enmity or any problem with anyone. The said FIR, bearing No.32/85, was registered under Section 365, IPC.The second FIR was lodged on 15.07.1985 at Barlut camp, Jadoli (Sirohi) at 7.00 P.M. The said complaint was made again by Kishan Lal, stating that since 08.07.1985 from 10 - 11 P.M., Nathuram is missing and a report was made earlier. However, after making a further search at all the places, including nearby village, Jungle, well and "Bavri", he could not be traced out. The complainant further stated that before Nathuram escaped, he was last seen with Suthar Jawana s/o. Churaji who was standing along with a Jeep, in a suspicious condition. On 18.06.1985, Nathuram came in a case of State v. Shivpuri to depose his statement against the accused at Sirohi Court and those statements were recorded by the Court on 18.06.1985. One Mahant Denpuri was beaten by Shivpuri, having past criminal report and a case was pending against the said Shivpuri, therefore, the complainant has shown suspicion against him,

looking to the facts stated above. The said FIR was also registered bearing No.32/85 under the same provisions of Section 365, IPC.

The Police had, thereafter, conducted usual investigation and then filed challan against Kishan Lal, Sardara Ram, Amba Lal, Ksnhiaya Lal and Satyanarain before the Munsif Magistrate, Sirohi, from where, the case was committed to the trial Court.

The learned trial Court framed charges against the accused under Sections 302, 364, 201 and 120-B of IPC. Accused denied charges and claimed trial. At the trial, twenty-four witnesses were produced by the prosecution, whereas sixty-four documents were exhibited. In defence, statement of one witness was recorded, whereas ten documents were exhibited. The statements of accused were recorded under Section 313 of Cr.P.C.

The learned trial Court, thereafter, convicted appellant accused Sardara Ram under Sections 302, 201 and 364, IPC. Under Section 302, IPC, appellant accused Sarda Ram was sentenced to life imprisonment and a fine of Rs.2,000/-, in default of payment of fine, to further suffer three months' Rigorous Imprisonment; under Section 201, IPC, accused

appellant Sardara was sentenced to seven months' Rigorous Imprisonment and a fine of Rs.2,000/-, in default of payment of fine to further undergo three months' Rigorous Imprisonment and under Section 364, IPC, life imprisonment and a fine of Rs.2,000/- in default of payment of fine, to further suffer three months' Rigorous Imprisonment. The said accused was, however, acquitted from the charge under Section 120-B, IPC. The other accused were also acquitted from the charges levelled against them.

Learned counsel for the appellant urged that it was a case of circumstantial evidence, wherein five accused were apprehended, out of five, four accused were acquitted, whereas Sardara Ram was convicted, despite of the fact that the case of Sardara Ram was not distinguishable to that of all other accused. It was submitted that only on three circumstances, Sardara Ram was convicted, despite of the fact that those circumstances, were not sufficient to connect accused with the crime. The first circumstance was that Sardara Ram threatened Nathuram to be meted with the same fate as that of Khangara (Sardara's father Khangara was killed by one Savia, who was then convicted). Presence of Sardara Ram at the place, where the deceased was last seen, i.e., at the temple where deceased Nathuram was seen at about 9 – 10 P.M. on 10.07.1985 and

lastly, at the instance of Sardara Ram, dead body of Nathuram was recovered. It was urged that all the three circumstances were not proved and were not otherwise sufficient to prove that Nathuram was killed by accused Sardara Ram and that too, when medical evidence does not support prosecution case. It was thus, prayed that looking to the facts and circumstances of the case, the appellant deserves to be acquitted from all the charges as he should have been given the same treatment as was given to other four accused. It was lastly urged that Savia was an important witness, but was not deliberately produced by the prosecution. Hence, conviction of the accused is merely on hearsay evidence which otherwise is not permissible to convict a person.

Per contra, learned Public Prosecutor appearing for the State, supported the judgment of the trial Court on the ground that when the dead body was recovered at the instance of accused Sardara Ram, then it became clear that Sardara Ram had killed Nathuram, who otherwise threatened him only ten days back of the occurrence. Thus, even two circumstances were sufficient to connect accused with the crime. However, the trial Court had taken into consideration a further fact that the deceased was last seen at the temple at around 9 – 10 P.M. on 10.07.1985, where Sardara Ram was also standing along with

the tractor. In those circumstances, leanred counsel prayed that the judgment of the trial Court deserves to be affirmed as there exists no perversity therein.

We have heard submissions of the learned counsel for the parties and scanned the material available on record carefully.

It is a case of circumstantial evidence, therefore, it is necessary to apply broad principles laid down by the Hon'ble Apex Court for adjudicating cases based on circumstantial evidence. The learned trial Court has taken note of following circumstances to connect accused with the crime :-

(1) Though accused and deceased were having cordial relations previously, but deceased had given his land on contract to accused and when accused's father's killer Savia was released from jail, after serving his imprisonment, then accused could know that his father was killed not only by Savia, but even by deceased Nathuram, therefore, when deceased Nathuram came to demand his money from Sardara Ram arising out of contract of land, then accused refused to give that money and stated that he will give same treatment to Nathuram as was given to his father.

(2) The deceased was last seen at the temple at around 9 - 10 P.M., where accused's tractor was seen along with 4 – 5 other persons, including Kishan Lal.

(3) When deceased nathu Ram could not be traced out, then Kishan Lal lodged two FIRs Ex.P-7 and Ex.P-12 to misguide the Police.

(4) As per the statement of PW 4 Smt.Dariya, it is proved that accused were indulged in criminal conspiracy.

(5) At the instance of Kanhaiya Lal, cloth belonging to accused were recovered and, at the same time, at the instance of Ambalal, tractor, from in the dead body of Nathulal was carried, was recovered by the Police and lathi and "Fawra" were recovered at the instance of Satyanarain, apart from the recovery of dead body of deceased Nathuram at the instance of Sardara Ram.

The first circumstance is pertaining to the threatening of accused Sardara Ram to deceased Nathuram. Prosecution case in this regard rests on the statements of five witnesses, namely, Smt.Rukmani (P.W.7), Bhoma (P.W.8), Smt.Sumti (P.W.9), Dharma (P.W.11) and Bhabuta (P.W.12). The witnesses had

shown that accused and deceased were in relation and previously, were having cordial relations. So far as PW 7 Smt.Rukmani is concerned, she had stated only one fact that for the last three years, they were receiving full contract amount, but in the year of occurrence, the amount of rent was not received. But, it does not prove the fact of giving threatening by accused to deceased. PW 8 Bhoma stated that Nathuram demanded contract amount from accused Sardara Ram, then Sardara Ram stated that his brother Kishan refused to pay contract amount to deceased Nathuram and, at that time, accused Sardara Ram gave threatening to Nathuram. Nathuram did not reply to the said threatening. In the cross-examination, witness admitted that deceased Nathuram and accused Sardara Ram were not having any dispute in regard to land and cultivation. The witness could not state as to what amount was demanded by Nathuram and admitted that accused's father was killed almost twenty-five years back, coupled with the fact that accused's father was killed by Savia who was cousin brother of deceased himself. The witness had admitted that even after murder of accused's father, the families of Nathuram and accused used to visit on all the festivals and auspicious occasions. PW 12 Bhabuta stated that Nathuram deceased had demanded money from Sardara, however, when accused refused to pay the amount and gave threatening, then Nathuram stated

that he will get money by the process of law. This statement of witness is in contradiction to the statement of PW 8 Bhoma who then stated that Nathuram did not say anything when accused gave him threatening. PW 9 Smt.Sumti though made a statement regarding first circumstance, but from the perusal of her statement, it does not reveal that she was present when Nathuram demanded money from accused Sardara. In fact, said witness made a statement on the basis of something heard by her. PW 11 Dharma stated that when accused refused to pay amount to deceased Nathuram, then accused stated that Savia has informed that Nathuram was involved in the murder case of accused's father. This statement of witness was contrary to his police statement (Ex.D-4), therefore, it becomes clear that the prosecution has tried to give a different story than what was stated by the witnesses before the police. On perusal of statements of all the witnesses, we do not find that much trust can be placed, because if such a threatening was given ten days prior to the occurrence, then immediately when Nathuram could not be traced out, then why all the witnesses had not given this story to the police, more so, when Nathuram was not available after 10 P.M. On 10.07.1985 and the FIR was lodged on 13.07.1985. We otherwise find that the statement of one witness is not corroborated by other, rather there exists contradiction which was then ignored by the trial Court, holding

it to be a minor contradiction. Looking to the reason that this part of the story was not given to the police, immediately when Nathuram was found missing, inasmuch as, if the witnesses were in know of such a threatening, then there was all the more reason for them to inform the police about this fact so that the investigation could be made accordingly. PW 11 Dharma has stated altogether a different fact than stated in his police statement. Therefore, in our opinion, the finding recorded by the trial Court to hold first circumstance to be proved, is not based on sound reasonings, therefore, cannot be maintained.

The second circumstance is regarding presence of the accused along with the others at the place where deceased Nathuram was seen last. In that regard, statements of PW 7 Smt.Rukmani and PW 10 Chatra are relevant. Perusal of statement of Rukmani (P.W.7) shows that she had heard noise of the tractor while she was sleeping and had not seen anybody in trolley, because she did not try to see the tractor trolley which was otherwise at a distance of half kilometer. Thus, the statement of said witness does not prove the second circumstance. However, the statement of Chatra (P.W.10) is also required to be considered who then stated that he and Mularam had seen that the tractor was coming from village Sahai. The said tractor was belonging to Kishan Lal and was driven by Amba

Lal. In the tractor, Sardara Ram, Kanhiaya Lal and Satyanarain were sitting. The said tractor was going towards temple. In the cross-examination, witness admitted that trolley was empty and he had not talked to any person, sitting on the tractor. He had seen all the five going towards temple at around 10 P.M. Thus, if at all, the statement of the said witness is accepted, then what has been stated is only a fact that five accused were going towards temple in a tractor, but none of the witnesses stated that they had seen deceased last with these five accused. Thus, even second circumstance is not proved to the effect that deceased was last seen with the accused, except to create a suspicion that the accused were moving towards temple. Thus, they have to be co-related with the offence.

The third circumstance is regarding lodging of FIRs by Kishan Lal vide Exs. P-4 and P-12 to put investigation to a different track which may not cause any suspicion on them. It is admitted fact that two FIRs were lodged by Kishan Lal, who is again relative of deceased Nathurram. But it has not come out as to how crime of Sardara is proved, more so, when Kishan Lal and others were acquitted by the trial Court. The trial Court has further considered that Kishan Lal gave indication against Shivpuri to divert investigation of Police in the wrong direction. Therefore, even if it is assumed that some wrong report was

made by Kishan Lal, then also, guilt of Sardara Ram is not proved or he cannot be connected with the crime, more so, when Kishan Lal is relative of deceased and otherwise, the author of that report was acquitted by the trial Court.

The next circumstance pertain to criminal conspiracy of the five accused. The allegation against five accused was that they kidnapped Nathuram and, thereafter, killed him. In that regard, statement of PW 4 Smt.Daria is relevant who is daughter of deceased Nathuram and otherwise wife of brother-in-law of accused Kishan Lal. The said witness stated that at the time when his father Nathuram was not traced out, she was at Siana. At the first instance, Amba Lal and Sardara came to Kishan Lal at Siana. Kishan Lal then stated that all the four brothers should complete the work and he will hand over things and, thereafter, Sardara and Kishna left the place. This is only the evidence to show that there was a criminal conspiracy between the accused. However, in the cross-examination, she stated that she does not live alone at her residence, rather her father-in-law Bhura also resides. In the cross-examination, witness Daria stated that Sardara and Ambalal came early morning and stayed there for an hour. Ambala stated to Sardara that he should complete his work and in response, Sardara stated that Ambalal should complete his work. Kishanlal did not say anything. Thus, there

was a contradiction in her statement, because what was stated in the examination-in-chief, was different than cross-examination. In any case, her statement does not show that the accused had conspiracy to the effect that they should kill Nathuram and otherwise, if this story is accepted, then all the accused should have been convicted and otherwise even the trial Court has not found this circumstance as proved.

Now comes the last circumstance regarding recovery of dead body of Nathuram and the other pertaining to recovery of clothes of deceased, tractor and a "Fawra". In regard to recovery of clothes, "Fawara" and tractor, trial Court has considered the statements of PW 21 Parbat Singh and PW 22 Asgar Ali, SHO. So far as Parbat Singh is concerned, he was declared hostile. Thus, the only statement to prove recovery of clothes, "Fawara" and tractor remains of PW 22 Asgar Ali. The trial Court has not relied on the statement of Asgar Ali being not a witness of truth, therefore, his statement, in that regard, was discarded. The trial Court has also considered the fact that the statement of Asgar Ali has not been corroborated by any other witness, therefore, circumstance regarding recovery of clothes, "Fawra" and tractor was held not to be proved by the trial Court itself. Now, remains only one issue, i.e., recovery of dead body of deceased.

So far as the recovery of dead body is concerned, the learned trial Court relied on the statement of Asgar Ali (P.W.22), though the witness was held, not stating truth. In any case, we have gone through the record and find that the prosecution case rest on few witnesses to prove this circumstance. PW 12 Bhabuta who had not stated any fact regarding recovery of dead body in his examination-in-chief, but in cross-examination, witness stated that he had visited the place from where dead body was recovered. Accused Sardara had informed Police about the place where body of deceased was concealed. According to the witness, Sardara asked Police people to proceed for Khara Bali and the body was recovered by Sardara and Ambalal. The witness further stated in his cross-examination that Chatra and Tara reached first at the place from where the body was recovered. Moda, Police people and Sarada reached at the place in a vehicle, in which Ambalal was also there. PW 13 Modaram then stated that the Police had taken all the five accused to trace out the body, where witness had proceeded along with others towards western side of village Manadar. The witness subsequently stated that Ambalal and Sardara were there with the Police and Sardara was showing the path to the Police who then identified the place, where deceased Nathuram was concealed. According to the witness, accused Saradara digged out the dead body and Ambalal remained seated on one

side. PW 16 Babulal stated that dead body was digged out by Sardara as well as Ambalal and the presence of Amnbalal has been corroborated by PW 17 Dr. Devkishan. However, Babulal admitted that Police had not asked the accused as to where body has been concealed. PW 23 Ramgopal, Deputy Superintendent of Police (Dy.S.P.) stated that accused Sardara had digged out the body. The witness admitted that all the five accused were not taken to recover the dead body. However, it was stated that Ex.P-59 was prepared at the instance of Sardara, where an information was given. Perusal of Ex.P-59 shows that accused Sardara informed that all the four brothers had put dead body of Nathuram in the tractor and, thereafter, the body was concealed after taking out clothes. The trial Court has relied on Ex.P-59 to hold that Sardara has committed offence under Section 302 of IPC. While recording this finding, the learned trial Court acquitted all other four accused, including Ambalal who accompanied Sardara to trace out the body and to dig out. The material shown above, was found to be sufficient by the trial Court to hold that the dead body was recovered at the instance of Sardara Ram, therefore, he is guilty of crime. However, at the same time, other four accused were acquitted holding that the recovery of clothes, "Fawara" and tractor could not be proved by the prosecution and once those recoveries could not be proved, four accused, namely, Kishanlal, Ambalal, Kanhaiyalal and

Satyanarain cannot be held guilty of offence. While recording this finding, the learned trial Court failed to take note of its own finding where it was held that the deceased was last seen with the five accused, coupled with the fact that as per the statements of PW 12 Bhabuta, PW 13 Modaram, PW 16 Babu Lal and P.W. 17 Dr. Dev Kishan, Amba Lal and accused Sardara Ram were involved in digging out the dead body, yet while acquitting Ambalal on the same facts and circumstances, accused Sardara Ram was convicted.

We find that the finding of the trial Court to convict accused Sardara Ram mainly rests only on one circumstance,i.e, recovery of dead body at his instance, inasmuch as if other circumstances are taken as proved, then other four accused cannot be acquitted or, in the alternative, if on one and the same evidence, four accused are acquitted, then how the fifth accused can be convicted. Thus, out of the five circumstances framed by the trial Court, we find that now remains only one circumstance, on the basis of which accused Sardara Ram can be convicted or acquitted, as, in our opinion, first four circumstances could not be proved by the prosecution or finding recorded by the learned trial Court in favour of the prosecution is found to be faulty. The perusal of Ex.P59 shows that if we rely on it, then all the five accused had to be convicted, because in that, appellant Sardara

Ram had not stated that he had alone taken Nathuram in the tractor and, thereafter, concealed him. Rather if that document is relied, then it involves all the accused in the crime. But the trial Court has already acquitted four accused. Thus, a different treatment cannot be given to Sardara Ram, more so, while considering the statements of PW 11 Dharma, PW 12 Bhabuta, PW 13 Modaram, PW 16 Babulal, PW 18 Manchharam, PW 22 Asgar Ali and PW 23 Ramgopal, we find that there are contradictions in their statements, inasmuch as, PW 22 Asgar Ali and PW 23 Ramgopal stated that body was traced out and was even digged only by Sardara Ram, whereas others stated that body was digged out by Sardara as well as Ambalal or at least these witnesses other than PW 22 Asgar Ali and PW 23 Ramgopal show presence of Ambalal, yet Ambalal has been acquitted by the trial Court, despite of his presence while digging out the body, and Sardara Ram is convicted.

Considering medical evidence, if statement of PW 17 Dr. Devkishan is looked into, then Nathuram died as a result of fracture and dislocation at a talentoaxial joint. Due to this, the cause of death shown is asphyxia. In the cross-examination, PW 17 Dr. Devkishan stated that such type of injuries can be caused when one is hanged and given lot of jerks or a person is kept in a situation where his entire body is put by giving weight on the

head. Then, in those circumstances, one can sustain such fracture. If that medical evidence is looked into, then the injuries sustained by the deceased cannot be attributed to one person, more so, when in the post-mortem report, deceased Nathuram is even being shown to be a healthy person of 45 years. But this aspect has not been considered by the trial Court.

Reverting back to the issue regarding recovery of body at the instance of Sardara, we find that this one circumstance itself is not sufficient to convict a person for an offence under Section 302, IPC, more so, when on the same evidence, other accused Ambalal has been acquitted. We find that there exists no chain of circumstances to prove the crime of accused Sardara Ram, more so, when statement of PW 22 Asgar Ali, SHO, has been held to be statement not of truth, then it was not safe for the trial Court to rely on the statement of said witness for the purpose of recovery of dead body, more so, possibility of remaining dead body intact under the soil, in a field, where jackals and dogs are available, was a question to have been considered by the trial Court. In the present matter, dead body was recovered by the Police, even after fifteen days which seems to be nothing but a circumstance created by the Police, to prove prosecution case, they have even recovered a “Fawra”, clothes of the accused and the tractor, but all those recoveries could not

be proved, rather statements of witnesses were found to be false. However, so far as recovery of dead body is concerned, the statements of witnesses were relied, despite of contradictions in their story, because two witnesses have not shown presence of Ambalal, whereas, four witnesses have shown presence of Ambalal for digging out the body. The trial Court was required to look into this aspect, because if the body was recovered at the instance of Sardara and Ambalal and it was digged out by Sardara and Ambalal, then all the witnesses should have stated one and the same fact. But, in the present case, Investigating Officer has stated different facts than the other witnesses. Thus, two witnesses, having not given one and the same story, their statements were not safe to rely. Therefore, on the basis of doubtful statement, conviction is not proper, more so, when on the same evidence, other accused Ambalal has been acquitted. Trial court has considered recoveries of clothes, "Fawra" and Tractor to be false or creation of prosecution, then how it can be said that recovery of body was not a creation of prosecution to prove their case.

In view of the discussions made above, we are not in agreement with the finding recorded by the trial Court against the accused appellant Sardara for his conviction under Sections 302, 201 and 364, IPC. The other accused, having been

acquitted, the appellant cannot be given different treatement, more so, when the prosecution has failed to show chain of circumstance to prove case against accused Sardara Ram, because only on one circumstance, that too based on doubtful statements of witnesses, an order of conviction cannot be passed. Therefore, we set aside the judgment of the trial Court where accused is convicted. Accordingly, accused Sardara Ram is also acquitted from all the charges. Accused Sardara Ram is already on bail, his bail bonds may be discharged. The appeal is allowed accordingly.

(MUNISHWARNATH BHANDARI),J.(BHAGWATI PRASAD),J

scd